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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 192

WILLIS E. GIESE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority (R. 22–26) and dissenting (R. 26–29) opinions in the United States Court of Appeals for the District of Columbia have not yet been reported. The oral opinion of the District Court appears at R. 19.

JURISDICTION

The judgment of the Court of Appeals was entered June 19, 1944. The petition for a writ of certiorari was filed June 26, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act

of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Was the petitioner entitled to assert, as a defense to a criminal prosecution under the Selective Training and Service Act of 1940 for willful disobedience of an order to report for induction, that the order was invalid on the ground that General Hershey, the Director of Selective Service, is, in deciding appeals to the President, an "agency of appeal" which under the Act must be composed of civilians?

2. If such a defense can be asserted in this proceeding, is it valid?

STATUTE INVOLVED

Section 10 of the Selective Training and Service Act of 1940, 54 Stat. 885 (50 U. S. C. App. 310), provided, at the time of the petitioner's classification, as follows:

> (a) The President is authorized—
>
> (1) to prescribe the necessary rules and regulations to carry out the provisions of this Act;
>
> (2) to create and establish a Selective Service System, * * * and * * * establish within the Selective Service System civilian local boards and such other civilian agencies, including appeal boards and agencies of appeal, as may be necessary

to carry out the provisions of this Act. * * * Appeal boards and agencies of appeal within the Selective Service System shall be composed of civilians who are citizens of the United States. * * *;

(3) to appoint by and with the advice and consent of the Senate * * * a Director of Selective Service who shall be directly responsible to him and to appoint and fix the compensation of such other officers, agents, and employees as he may deem necessary to carry out the provisions of this Act: *Provided,* That any officer on the active or retired list of the Army, Navy, Marine Corps, or Coast Guard, or of any reserve component thereof * * * who may be assigned or detailed to any office or position to carry out the provisions of this Act (except to offices or positions on local boards, appeal boards, or agencies of appeal established or created pursuant to section 10 (a) (2)) may serve in and perform the functions of such office or position without loss of or prejudice to his status as such officer in the Army, Navy, Marine Corps, or Coast Guard or reserve component thereof * * *.

Section 2 (a) of the Act of December 5, 1943 (Public Law 197, 78th Cong., 1st Sess.), amended Section 10 (a) (2) to provide as follows:

(2) To create and establish a Selective Service System, * * * and * * * establish within the Selective Service System civilian local boards, civilian appeal

> boards, and such other agencies, including agencies of appeal, as may be necessary to carry out the provisions of this Act. * * * Appeal boards within the Selective Service System shall be composed of civilians who are citizens of the United States. * * *

STATEMENT

The petitioner was indicted in the District Court of the United States for the District of Columbia for willfully refusing to report for induction into the armed forces of the United States as directed by the order of his local board, in violation of the Selective Training and Service Act of 1940, 54 Stat. 885 (50 U. S. C. App. 301, et seq.) (R. 13). He waived trial by jury (R. 14), was found guilty by the court (R. 19), and was sentenced to imprisonment for an indeterminate period of from three months to three years (R. 20). Upon appeal to the Court of Appeals, his conviction was affirmed, with Chief Justice Groner dissenting (R. 30).

At the trial the Government showed that the petitioner registered with his local board and filed his questionnaire, and that on March 6, 1941, he was classified I–A (available for military service). On March 10, 1941, he took an appeal from that classification to the appeal board, and, while his appeal was pending, filed the regular Selective Service form provided for persons claiming

conscientious objections. As required by the Act (Sec. 5 (g)) and the Selective Service Regulations (Sec. 627.25), the appeal board referred the matter to the Department of Justice. The Department's hearing officer recommended against the petitioner's claim, and the appeal board on November 5, 1942, unanimously decided to continue petitioner in I–A. Thereafter, the petitioner requested the Director of Selective Service for the District of Columbia to take an appeal to the President from the decision of the appeal board. Such an appeal was taken, and on February 19, 1943, the Director of Selective Service, acting for the President, classified the petitioner I–A. The petitioner was thereafter ordered to report for induction, and he refused to do so. (R. 14–17.)

For his defense the petitioner contended that he was classified I–A "by an agency of appeal not composed of civilians, but of military officials in violation of the Selective Training and Service Act, as amended, and hence that defendant had never been classified on his appeal to the President or ordered to report for induction according to law" (R. 19). The only evidence offered in support of this contention consisted of a stipulation (R. 17–18) between the parties that General Hershey would have testified as follows:

> I am Director of Selective Service and was Director of Selective Service during

the time involved in this appeal. I am and was at that time an officer of the United States Army on active duty, assigned to the Selective Service System, and as such detached from duty in the War Department. The entire file in the appeal to the President of Willis E. Giese, Order No. 398, Local Board No. 2, District of Columbia, taken by the State Director of Selective Service for the District of Columbia, from the 1-A classification of Board of Appeals No. 1, District of Columbia, was forwarded to the Director of Selective Service as required by Section 628.4 (c), Selective Service Regulations. The entire file was reviewed by six members of my staff who are assigned to a Board of Review established within the Selective Service System, known as the Planning Council, to consider Presidential appeals and make recommendations to me concerning them. These men made recommendations to me concerning the disposition of this appeal. Five of these men are members of the Officers Reserve Corps of the Army of the United States. The other is an officer in the United States Naval Reserve. All of these men had been ordered to active duty, but had been assigned to the Selective Service System, a civilian agency functioning under the Chairman of the War Manpower Commission, as authorized under Section 10 (a) (3) of the Selective Training and Service Act of 1940 as amended. The entire file,

together with the recommendations of these men, was forwarded to me. On February 19, 1943, after considering the entire file and above-mentioned recommendations, and acting by authority of the President and as Director of Selective Service, I signed the decision and appeal to the President, No. 17449, retaining Willis E. Giese in Class I-A. * * *

ARGUMENT

1. The court below correctly held that the rationale of this Court's decision in *Falbo* v. *United States,* 320 U. S. 549, is applicable here, and that the petitioner could not excuse his disobedience of the order to report for induction on the ground that his classification was made by an improperly constituted "agency of appeal." Here, as in the *Falbo* case, the petitioner failed to exhaust the administrative procedure provided by Congress. "Completion of the functions of the local boards and appellate agencies, important as are these functions, is not the end of the selective service process. The selectee may still be rejected at the induction center * * *. Thus a board order to report is no more than a necessary intermediate step in a united and continuous process designed to raise an army speedily and efficiently" (320 U. S. at 553).

No question is raised as to the composition of the local board and its legal authority to order

the petitioner to report for induction, or as to the validity of such order on its face. We submit, therefore, that the petitioner was under a clear obligation to obey the order. To permit a registrant to disobey an order to report for induction on the ground that he was unlawfully classified because his appeal to the President was not decided by a proper official "would allow litigious interruption of the process of selection which Congress created" (320 U. S. at 554).

The decision below is not in conflict with *Tung* v. *United States,* decided by the Circuit Court of Appeals for the First Circuit on May 24, 1944. The registrant in the *Tung* case was ordered to report for induction while his appeal was still pending. The court held that "a registrant has the right to pursue his administrative remedies uninterruptedly to the end, and that as a necessary consequence an order to report for induction issued while an appeal is pending in the system is void and need not be obeyed." In the instant case, however, the induction order was issued only after the petitioner's appeal had been considered and rejected. There was no interference with his right to pursue the available administrative remedies. It was his inescapable duty, therefore, to exhaust the administrative procedure by complying with the induction order, whatever his views as to its validity. See *Bagley* v. *United States,* decided June 14, 1944, by the Circuit Court of Appeals for the Ninth Circuit.

2. Even if the principle of the *Falbo* case should be regarded as inapplicable, the petitioner's defense could not succeed on its merits. An identical contention was unsuccessfully pressed upon the Court on petition for rehearing in *Bowles* v. *United States,* 319 U. S. 33, 785. The brief of the Government in opposition to rehearing in the *Bowles* case reviewed the language and history of the relevant statutory provisions, and concluded that the Director of Selective Service, in deciding appeals to the President, was not an "agency of appeal" within the meaning of the Act. We believe it to be unnecessary, therefore, to reargue the question here. In any event, the importance of the question is substantially diminished by the clarifying amendment made by the Act of December 5, 1943 (Public Law 197, 78th Cong., 1st Sess.), *supra,* pp. 3–4, explicitly providing that only local and appeal boards must be composed of civilians. The report of the House Committee on Military Affairs stated the purpose of the amendment as follows:

> Due to the confusion that seems to exist as to the authority of the State directors of Selective Service to act as agencies of appeal because of the fact that such persons are members of the military service, your committee felt that clarifying language was necessary in order that the intent of the Congress might be made definite; i. e., that the local boards and the local appeal boards should be made up of civilians exclusively.